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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT GALLARDO,

Defendant and Appellant.

D055505

(Super. Ct. No. SCD214199)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

A jury convicted Robert Gallardo of assault with a deadly weapon or with force likely to produce great bodily injury based on strangulation (Pen. Code,¹ § 245, subd. (a)(1); count 2), two counts of corporal injury to the mother of his child (§ 273.5, subd. (a); counts 4 & 6), forcible false imprisonment (§§ 236 & 237, subd. (a); count 5), and misdemeanor escape from arrest (§ 836.6, subd. (b); count 7). The jury also found

¹ All statutory references are to the Penal Code unless otherwise specified.

true allegations that Gallardo had personally used a deadly weapon, a rope, in the commission of counts 2 and 4 (§ 1192.7, subd. (c)(23) (count 2); § 12022, subd. (b)(1) (count 4)).²

In a bifurcated proceeding, the trial court found true that Gallardo had suffered four serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12), which also constituted one serious felony under section 667, subdivision (a)(1) and one prior prison term (§ 667.5, subd. (b)). At sentencing, after denying Gallardo's motion to strike any of his strike priors with regard to counts 2, 4 and 5, the court struck all four strike priors as to count 6 and imposed a total prison term of 32 years to life. The court then imposed various restitution fines and granted Gallardo 15 days of presentence custody credit, consisting of 13 actual days served and two days of local conduct credit under section 2933.1.

Gallardo has timely appealed, challenging only his sentence. He contends the trial court abused its discretion when it refused to strike all but one of his prior strike convictions with regard to counts 2, 4 and 5 in the interests of justice and the resulting three indeterminate sentences of 25 years to life constitute cruel and unusual punishment under both the state and federal constitutions because they are disproportionate to his current offenses. Although the People disagree, the People assert the matter must be remanded for the limited purpose of having the trial court select and impose a full

² The jury found Gallardo not guilty of a second assault charge based on strangulation (count 3) and found two great bodily injury allegations as to counts 2 and 4 not true. The court granted the prosecution motion to dismiss the count 1 forcible rape after the jury deadlocked on that charge.

strength term for count 6 and to correct the judgment and abstracts of judgment for various sentencing errors, including the award of presentence credits. Gallardo has not opposed the issues of unauthorized sentencing raised by the People. In this regard, we have granted Gallardo's request to augment the record with a supplemental clerk's transcript showing the trial court amended the abstract of judgment to award him presentence custody credit of 361 actual days and 54 section 2933.1 credits for a total of 415 days nunc pro tunc to the date of sentencing.

We affirm Gallardo's convictions and true findings, but reverse his felony sentence as unauthorized and remand the matter for resentencing.

FACTUAL BACKGROUND

As Gallardo does not challenge the sufficiency of the evidence to support his convictions and findings, we omit the traditional statement of facts, merely sketching the facts regarding his current convictions that stemmed from several domestic disputes between him and Angelica E., the mother of his daughter born in February 2008. Gallardo had been in an intimate dating relationship with Angelica for about eight months in 2007, leaving her in October 2007, when he went back to prison for a parole revocation term. On May 31, 2008, after getting out of prison, Gallardo visited Angelica, who was then living with another man, and met his infant daughter for the first time. Although Angelica continued in her relationship with the other man, she began spending some intimate time with Gallardo again.

On June 8, 2008, while Gallardo was with Angelica and his child at the beach, they got into an argument when he complained about her other relationship, accusing her

of not taking proper care of his baby and she slapped him in the face. Gallardo then slapped her twice in the face fairly hard with an open hand, causing her to see stars and suffer a cut and bruised lip. The two continued to argue about Angelica's relationship with the other man and Gallardo kept his daughter with him overnight at the home of another former girlfriend.

The next afternoon, Gallardo called Angelica to have her bring him some diapers and formula for their baby. After doing so, as Angelica was leaving for work, Gallardo followed her to her car, took the keys out of the ignition and told her to come in the house. Once inside, an argument ensued and Gallardo became physical, grabbing Angelica by the hair, throwing her to the ground, slapping her head and kicking her as she lay curled up on the floor covering her face. As Angelica stood up, Gallardo grabbed a yellow rope and wrapped it around her neck from behind, squeezing it tight until she fell backward to the floor on top of him and passed out. When she awoke and tried to get up, Gallardo choked her again. When she regained consciousness, Gallardo ordered her to the kitchen where they continued to argue and he physically prevented her from leaving the house. Eventually, Gallardo drove with Angelica and his daughter to pick up another daughter of his from school. After arriving back home, Gallardo returned Angelica's keys to her so she could go to work, telling her not to make a scene.

When Angelica arrived at work late, upset, crying, she told her supervisor that Gallardo tried to strangle her. Her supervisor called the police, who after an initial investigation, arrested Gallardo on the instant charges. While the transporting officer

filled out paperwork for Gallardo's custody, he escaped from the patrol car. Several days later, the police found Gallardo hiding out at a friend's house.

After the jury returned its verdicts, Gallardo's counsel filed a sentencing statement containing a request for concurrent sentencing and for dismissal under section 1385 of all but one of Gallardo's four strike priors that arose out of the same robbery case seven years earlier when he was only 20 years old.

At sentencing, after noting it had reviewed the probation report, the sentencing statements of both Gallardo and the People opposing his requests to be sentenced as a second strike defendant, and a packet of letters in support of Gallardo, the court heard argument from counsel on whether Gallardo should be sentenced under the full impact of the three strikes law. The prosecutor stressed that contrary to Gallardo's position, the earlier strike case with the four priors was very serious, involving Gallardo putting a gun to four victims' heads or bodies to commit the robberies of each person and that soon after being released from prison for such crimes he continued his criminal path, with these latest offenses being committed within nine days after being released on parole after a revocation. Gallardo's counsel asserted the June 8 and 9 crimes were essentially part of one domestic argument that spanned the two days warranting only concurrent terms and that the court had the discretion to strike one or all of the strike priors for each offense because they arose out of the same case.

After also hearing from Gallardo and his mother, the court denied probation and made clear its sentencing discretion regarding the five counts before it. In response to numerous letters that talked about Gallardo's good qualities and described him as a

peaceful person, the court noted it had sat through the trial and had also reviewed "the probation report's description summary of the course of conduct that led to the four strike convictions." After recounting the facts of the November 2001 robberies, the court said that although Gallardo after arrest had denied any knowledge of them, "obviously holding a gun to the heads of four different men certainly does not indicate the defendant is a man of peace, or at least he wasn't at that time."

The court then recounted criminal conduct by Gallardo in October of 2007 at the Fashion Valley mall while he was on parole that resulted in his arrest for vehicle tampering, possession of burglary tools and driving without a valid license, which the court commented was "an attempt to commit serious felonies, although the ultimate result was a misdemeanor conviction or convictions. The conduct demonstrated a lot about what [Gallardo] had or had not learned in prison and from his parole officer." The court also noted that after going through Gallardo's criminal history, his current parole agent described his overall performance on parole as "dismal."

The court then turned to Gallardo's current offenses, which included violent assaults in three counts, noting the DNA evidence regarding his use of a rope to strangle Angelica was overwhelming and corroborated her account of what happened on June 9, 2008. The court found the count 6 assault by Gallardo on Angelica the day before was not part of the same set of operative facts or the same course of conduct as the assault with the rope so it could find no discretion under the three strikes law to impose a concurrent term for that count rather than a consecutive term.

With such background thoughts, and its review of the case law relating to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and section 1385, the court then exercised its discretion not to strike any of Gallardo's strikes with regard to count 4, stating that "[t]he nature of the violent assault [in that count, which it considered the most serious], together with the nature of the defendant's violent past and violations of parole, make it clear that he does come squarely within the Legislative intent of the three strikes law." Thus with regard to counts 2, 4, and 5 the court denied Gallardo's request to strike any strikes.

However, as to count 6, the June 8, 2008 face slapping assault, which it found significantly less serious than the assaults on June 9, 2008, the court exercised its discretion to strike all the prior strikes under the authority of *People v. Garcia* (1999) 20 Cal.4th 490, in light of the already lengthy term that it was imposing for those other counts, which included a consecutive term for count 6.

Thereafter, the trial court sentenced Gallardo on count 4 to an indeterminate term of 25 years to life under the three strikes law plus one year for the weapon use enhancement. It then imposed and stayed the indeterminate 25-year-to-life three strike sentences for counts 2 and 5 stemming out of the same incident as count 4 and imposed a consecutive term for count 6 of one-third the midterm or one year. Finally, the court imposed a mandatory five-year consecutive term for the serious felony prior under section 667, subdivision (a)(1) and stayed the one-year enhancement for the prison prior

based on the same conviction under section 654, for a total prison term of 32 years to life.³

As for credits, the court initially questioned why Gallardo was not receiving credit for all his time in custody since his arrest in June 2008 until the time of sentencing. After the probation officer explained that he would not receive credits for the time he had done for a parole violation, which also "included absconding," the court reviewed the matter and concluded that in light of his violent felonies and life term, Gallardo could not be given credits under section 4019, but rather only under section 2933.1, calculated at 15 percent. However, the court agreed with Gallardo's counsel that the credits determination was without prejudice to submit a supplemental sentencing statement to modify the credits if it were shown that the parole violation was based on this case. Until that time, the court would not dispute the probation officer's assessment other than to recalculate good time credits for Gallardo under section 2933.1.

Subsequently, in response to a supplemental motion, the trial court amended the abstract of judgment to award Gallardo presentence custody credit and good time credit under section 2933.1 for the entire time of his custody on this case nunc pro tunc to the date of sentencing.

³ The court imposed a one-year term for the count 7 misdemeanor escape conviction to "run concurrently with the remainder of the judgment."

DISCUSSION

I

MOTION TO STRIKE

Gallardo contends the trial court abused its discretion when it denied his request to strike all but one of his prior convictions because his four prior strikes all arose from a single incident that was punished in a single case after he pled guilty, his current offenses arose from a unique set of circumstances involving an isolated domestic dispute, his other criminal history is minimal with no history of real violence, and the court primarily relied upon unreliable hearsay in the original probation report regarding the strike priors in denying his request. We disagree.

We review a trial court's decision not to strike a prior conviction under section 1385 under the "deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*); see also *Romero, supra*, 13 Cal.4th at pp. 530-531.) Under this standard, we do not reweigh the sentencing factors or substitute our evaluation for that of the trial court. A "'decision will not be reversed merely because reasonable people might disagree" ' "; rather, "a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances [, such as] where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible facts in declining to dismiss [citation], [or where] 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce an 'arbitrary, capricious or patently absurd' result' under the specific facts of a particular case." (*Carmony, supra*, 33 Cal.4th at pp. 377-378.)

A trial court must also " "consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not been previously convicted of one or more serious and/or violent felonies" " before exercising its discretion to strike a prior felony conviction. (*Carmony, supra*, 33 Cal.4th at p. 377; *People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

The burden is on the party attacking the trial court's decision not to dismiss the prior strike conviction to clearly show that the decision was irrational or arbitrary and absent such showing, it is presumed the court acted to achieve a legitimate sentencing objective. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) Gallardo has not met that burden.

The trial court here was clearly aware of its discretion to dismiss a strike and did so with regard to count 6. Gallardo has failed to point out anything in the record that shows the court declined to exercise its discretion regarding counts 2, 4 and 5 based on a clearly improper reason or that it did not properly consider any mitigating factors.

"Absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty to consider all possible mitigating and aggravating factors in determining the appropriate sentence." (*People v. Oberreuter* (1988) 204 Cal.App.3d 884, 888, disapproved on another ground in *People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023.) It is not our role to reweigh the sentencing factors or substitute

our evaluation for that of the trial judge who in this case clearly expressed the view that Gallardo's increasingly violent criminal history coupled with his poor performance on probation and parole did not justify the exercise of his discretion to strike the priors with regard to counts 2, 4 and 5. The court's exercise of its discretion is amply supported by the record.

To the extent Gallardo argues the court abused its discretion by improperly relying upon hearsay in the probation report regarding the four earlier robbery convictions to deny his request to dismiss the strikes, such argument fails. Not only may the court properly consider and rely upon responsible hearsay in exercising its sentencing discretion (see *People v. Otto* (2001) 26 Cal.4th 200, 212-213), Gallardo's counsel did not object below to the court's consideration of the facts stated in the probation report regarding his earlier robbery case. Further, the recitation of those earlier robbery facts was used by the court to counter Gallardo's family's and friend's representation in letters that Gallardo was a peaceful man and not violent, which was merely one factor the court considered in determining Gallardo fell under the three strikes law.

Moreover, contrary to Gallardo's reliance on *People v. Burgos* (2004) 117 Cal.App.4th 1209, the fact that a defendant's prior convictions arose from a single occasion is merely one factor to be considered by a court in exercising its discretion under *Romero* rather than a requirement to strike the prior convictions. (See *People v. Scott* (2009) 179 Cal.App.4th 920, 930-931.) In addition, unlike the defendant's crimes in *Burgos*, *supra*, 117 Cal.App.4th at page 1212, which arose from a single criminal act, Gallardo's prior robberies, although committed during the same episode of criminal

activity, consisted of multiple acts against four different victims that were exempt from the sentencing restrictions of section 654. Gallardo also has had a dismal overall record of performance on parole, a factor not present in *Burgos*. (*Id.* at pp. 1216-1217.)

On this record, Gallardo has simply not shown that he warrants departure from the legislatively preferred three strikes sentencing scheme. Because he has made no effort to change his criminal behavior after getting out of prison for a parole violation, which followed an earlier lengthy incarceration after an even earlier probation violation for crimes of increasing severity, Gallardo is the type of recidivist who falls wholly within the "spirit" of the three strikes law. (*Williams, supra*, 17 Cal.4th at pp. 162-163.) Under these circumstances, we cannot find that the court abused its broad sentencing discretion in this matter. (*Carmony, supra*, 33 Cal.4th at pp. 377-378.)

II

CRUEL AND/OR UNUSUAL PUNISHMENT

Characterizing his sentence as three indeterminate 25-year-to-life terms under the three strikes law, Gallardo next contends his sentence constitutes cruel and unusual punishment as a matter of law under both the state and federal constitutions because they are "grossly" disproportionate to the gravity of his current offenses. In support of his claim, he looks at the sentencing range of each of his convictions as a first time offender, noting the longest term would be four years, which is five times less than he received in this case and more than a defendant would receive for second degree murder. He also uses the same base terms for comparison with punishments under other states' recidivist

statutes. We reject Gallardo's arguments and find the 25-year-to-life term imposed in this case does not constitute cruel and unusual punishment.

Initially we make several observations. First, although Gallardo technically has forfeited the issue on appeal because he did not raise any cruel and unusual claim or objection below (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27), we "shall reach the merits under the relevant constitutional standards, in the interests of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim" (*People v. Norman* (2003) 109 Cal.App.4th 221, 229-230) and for guidance on remand. Second, contrary to Gallardo's assertion otherwise, he is only subject to serving one 25-year-to-life three strikes term for count 4 as the court stayed the three strikes terms for counts 2 and 5 under section 654. Third, Gallardo fails to appreciate the punishment under scrutiny here is the result of not merely his current count 4 felony conviction, but also a combination of his qualifying priors which triggered the mandatory 25-year-to-life sentence under the three strikes legislation (§ 667, subds. (d) & (e)), the general facial constitutionality of which he does not challenge. Thus it is as a recidivist felon that Gallardo is being punished and not as a theoretical first time offender for whom he bases most of his arguments. From our independent review of the record in light of the applicable law, we conclude imposition of the required three strikes term for count 4 in this case is not cruel or unusual.

To the extent Gallardo relies on article I, section 17 of the California Constitution, his challenge must be considered in light of *In re Lynch* (1972) 8 Cal.3d 410⁴ and *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*).⁵ The power to define crimes and prescribe punishment in California is a legislative function and the courts may interfere in this process only if a statute or statutory scheme prescribes a penalty so severe in relation to the crime or crimes to which it applies as to violate the constitutional prohibition against cruel or unusual punishment. (*Dillon, supra*, 34 Cal.3d at pp. 477-478; *In re Lynch, supra*, 8 Cal.3d at pp. 423-424.) It is well accepted that recidivism in the commission of

⁴ *In re Lynch* applied a three-pronged approach to determine whether a particular punishment is disproportionate to the offense for which it is imposed. (*In re Lynch, supra*, 8 Cal.3d at pp. 429-438.) Under the first prong, the California Supreme Court examined the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*Id.* at p. 425.) Second, the court compared the challenged punishment with that prescribed for more serious crimes in the same jurisdiction. (*Id.* at p. 426.) Finally, the challenged punishment was compared with punishments for the same offense in other jurisdictions. (*Id.* at p. 427.) After its analysis, the court there held an indeterminate sentence of one year to life for recidivists who commit indecent exposure under section 314 was void as cruel or unusual punishment. (*Id.* at p. 439.)

⁵ In *Dillon* the California Supreme Court reaffirmed *In re Lynch* and concluded that under the facts of that case, the life imprisonment of a 17-year-old defendant for first degree murder based on a felony-murder theory violated California's constitutional prohibition against cruel or unusual punishment. (*Dillon, supra*, 34 Cal.3d at pp. 450-452, 477, 482-483, 489.) The court in so deciding refined the first *Lynch* prong, stating trial and reviewing courts should examine "not only the offense in the abstract[,] but also " 'the facts of the crime in question.' [Citation.]" (*Id.* at p. 479.) Courts should consider "the totality of the circumstances" including motive, the way the crime was committed, the extent of the defendant's involvement, and the consequences of the defendant's acts. (*Ibid.*) With respect to the nature of the offender, a court should ask whether "the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

multiple felonies poses a manifest danger to society, which justifies the imposition of longer sentences for subsequent offenses. (See *People v. Karsai* (1982) 131 Cal.App.3d 224, 242 [recidivist statute for violent sex offenders], overruled on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.) So-called habitual criminal statutes which substantially increase the severity of punishment for those who have demonstrated a propensity to repeatedly commit criminal offenses serious enough to be punished as felonies are long-established. (See *In re Rosencrantz* (1928) 205 Cal. 534, 535-536, 539-540 [upholding imposition of life sentence without possibility of parole for defendant convicted of fraudulently uttering a check without sufficient funds after three prior felony convictions]; *People v. Weaver* (1984) 161 Cal.App.3d 119, 125-126 [discussing California's long history of upholding habitual offender statutes].) In explaining the validity of such recidivist statutes the Supreme Court of the United States has stated:

"The purpose of a recidivist statute . . . [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285.)

Ultimately, the test whether a specific punishment is cruel or unusual is whether it is " 'out of all proportion to the offense' . . . so as to shock the conscience and offend fundamental notions of human dignity." (*In re DeBeque* (1989) 212 Cal.App.3d 241,

249, quoting *Robinson v. California* (1962) 370 U.S. 660, 676 and citing *In re Lynch*, *supra*, 8 Cal.3d at p. 424.) Determining whether a given punishment is cruel or unusual depends on the facts of the specific case. (*In re DeBeque*, *supra*, at p. 249.) Although determinations whether a punishment is cruel or unusual may be made based on the first *Lynch* factor alone, i.e., the nature of the offense and/or offender, the defendant has the burden of establishing his punishment is greater than that imposed for more serious offenses in California and that similar offenses in other states do not carry punishments as severe. (See *In re DeBeque*, *supra*, at pp. 254-255; see, e.g., *Dillon*, *supra*, 34 Cal.3d at pp. 479, 482-488.) Successful challenges to proportionality are an "exquisite rarity." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

Here, Gallardo has not met that burden. In addition to his current count 4 offense of corporal injury to the mother of his child, which was aggravated by committing it with a deadly weapon, Gallardo was found to have previously committed armed robberies, which are serious prior felony convictions having tremendous potential for injury or death.

Even if we review the matter by analyzing the factors under the first *Lynch* prong, nature of the offense and/or offender, we reach the same conclusion that the 25-year-to-life term imposed for count 4 does not constitute cruel or unusual punishment. Gallardo, unlike the youthful 17-year-old first time offender in *Dillon*, was 27 years old at the time of sentencing and had already suffered four prior serious felony convictions, served a six-year prison term, plus additional prison time for revocation of parole. The circumstances of his current count 4 offense reveal he, unlike the youth in *Dillon*, was fully culpable for

its commission; i.e., his attack on Angelica with the rope was supported by DNA and other physical evidence. By committing this new felony while on parole, Gallardo has shown he has no intention of abiding by the laws of the State of California.

Further, because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals (see *In re Rosencrantz*, *supra*, 205 Cal. at pp. 535-536, 539-540; *People v. Weaver*, *supra*, 161 Cal.App.3d at pp. 125-126), it is illogical to compare Gallardo's punishment for his count 4 "offense," which includes his recidivist behavior, to the punishment of others in California who have committed the same underlying or more serious crimes such as first degree murder, but are not qualified repeat felons. Such other offenders would likely receive similar or longer sentences under the three strikes law if such were applicable to them because of recidivist conduct.

As for a comparison among other states' recidivist statutes, even though California's three strikes law may provide more severe punishment in some respects than other jurisdictions' schemes, overall, it "is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders." (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1416, disapproved of on another point in *People v. Dotson* (1997) 16 Cal.App.4th 547, 559.)

In addition, in light of the holdings in *Harmelin v. Michigan* (1991) 501 U.S. 957, *Rummell v. Estelle*, *supra*, 445 U.S. 263, 284-285, and the more recent United States Supreme Court companion cases of *Ewing v. California* (2003) 538 U.S. 11 and *Lockyer v. Andrade* (2003) 538 U.S. 63, which held lengthy indeterminate life sentences imposed under California's three strikes law for recidivist criminals did not violate the Eighth

Amendment, any reliance in this case upon the federal prohibition of cruel and unusual punishment to argue "gross disproportionality" would likewise be unsuccessful. As already noted, Gallardo suffered four prior strike convictions before the offenses in this case. He had served a prior prison term and had recently been released on parole when he committed the current violent crimes.

Given all the relevant considerations, that Gallardo will serve 25 years to life for his count 4 felony conviction simply does not shock the conscience or offend concepts of human dignity. We thus conclude Gallardo has failed to establish his sentence for count 4 is so disproportionate to his "crime," which includes his recidivist behavior, and the indeterminate term imposed for that crime does not violate the constitutional prohibitions against cruel and unusual punishment.

III

UNAUTHORIZED SENTENCE

Finally, in their respondent's brief, the People contend, and Gallardo does not dispute, that the trial court imposed an unauthorized sentence when it failed to select and impose a full strength sentence for count 6 as the principal determinate term to run consecutively to the count 4 indeterminate term and when it calculated presentence custody credits under section 2933.1. Gallardo also does not dispute the People's request to have the abstract of judgments corrected to conform to the oral pronouncement of judgment regarding the weapon use and prison prior enhancements and to only award credits once for this current case. Our review confirms the matter must be remanded for

resentencing to permit the court to impose a legally authorized aggregate sentence and to correct the amount of credits.

As the People point out, the trial court was required to calculate the determinate term for count 6 and the indeterminate sentences for counts 2, 4 and 5 separately, and then impose a full strength term on that principal determinate term to run consecutively to the indeterminate sentence. (See *People v. Felix* (2000) 22 Cal.4th 651, 655; *People v. Garza* (2003) 107 Cal.App.4th 1081, 1094.) Because count 6 was the only conviction to be sentenced as a determinate term under section 1170.1, it was necessarily the principal term in this case, which had to be considered and calculated independently of the indeterminate portions of the sentence. Because the court failed to impose a full strength term for count 6, that portion of the sentence was unauthorized.

The People ask that there only be a remand to the trial court for the limited purpose of permitting the court to select and impose a full strength sentence of two, three or four years, for count 6 and to otherwise correct the abstracts of judgment. However, as we explain, resentencing in this case is not limited to just the unauthorized portions. (See *People v. Mustafaa* (1994) 22 Cal.App.4th 1305 (*Mustafaa*), *People v. Dominguez* (1995) 38 Cal.App.4th 410, *People v. Torres* (2008) 163 Cal.App.4th 1420 (*Torres*).)

With regard to unauthorized sentences, the rule against imposition of a harsher sentence on remand for resentencing due to double jeopardy concerns generally does not apply where the original sentence is unauthorized. (See *People v. Serrato* (1973) 9 Cal.3d 753, 764-765 (*Serrato*), disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Hill* (1986) 185 Cal.App.3d 831.) In

upholding the imposition of a corrected sentence that was longer than the one originally illegally imposed, the court in *Hill* stated that "[w]hen a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited merely to striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme. [Citation.] . . . The trial court is entitled to rethink the entire sentence to achieve its original and presumably unchanged goal." (*Id.* at p. 834.)

This rule has been clarified more recently in *Torres, supra*, 163 Cal.App.4th 1420, where the court distinguished between cases where the original sentence showed a "legally unauthorized leniency that resulted in an aggregate sentence that fell below that authorized by law" (*id.* at p. 1432), and those cases like *Mustafaa, supra*, 22 Cal.App.4th 1305, where the court had imposed "a legal aggregate sentence, only fashioning it in an unauthorized manner." (*Id.* at pp. 1311-1312.)

Here, unlike in *Mustafaa, supra*, 22 Cal.App.4th 1305, the original sentence imposed was not a legally aggregate one. The trial court's imposition of a subordinate one-third midterm for count 6 to run consecutive to the indeterminate term imposed for count 4, instead of the required full strength principal term for count 6, resulted in a "legally unauthorized leniency" which brought Gallardo's sentence under *Serrato's* (*Serrato, supra*, 9 Cal.3d 753) exception to the double jeopardy prohibition on imposing

a longer sentence on remand following appeal. We, therefore, vacate Gallardo's felony sentence and remand the matter for resentencing without limitations.

On remand, the trial court "must arrive at its sentencing decision utilizing the correct law and considering all of the factors necessary to make that decision. . . ." (*Torres, supra*, 163 Cal.App.4th at p. 1433.) Although we have determined that the court's exercise of discretion in denying Gallardo's motion to strike his strike priors for sentencing purposes with regard to counts 2, 4 and 5 was valid, the court will be able to reconsider that motion on remand as there is no indication in the record how it would have exercised its overall discretion regarding the motion and the total sentence had it been aware it was required to impose a full consecutive principal determinate term for count 6. Even though the court is not limited in this case from imposing a sentence greater than that originally imposed, it is also not precluded from imposing the same or a lesser length sentence in the legal exercise of its discretion.

The People also point out several errors in the judgment and abstracts of judgment which must be corrected on remand. First, although the reporter's transcript shows the court in its oral pronouncement of judgment imposed a consecutive year for the weapon use enhancement attached to count 4 and stayed the prison prior enhancement, the indeterminate abstract of judgment shows an additional year was imposed for the prison prior rather than the weapon enhancement. On remand, the new abstract of judgment must conform to the oral pronouncement of judgment. (§ 1260; *People v. Boyde* (1988) 46 Cal.3d 212, 256.) In this regard, we note that in addition to the original clerical error in the indeterminate abstract of judgment concerning which enhancement was imposed,

the prison prior enhancement should have been stricken as a matter of law rather than stayed under section 654 because it was based upon the same 2001 robbery convictions for which Gallardo was receiving a five-year enhancement under section 667, subdivision (a). (See *People v. Jones* (1993) 5 Cal.4th 1142, 1153; *People v. Jones* (1992) 8 Cal.App.4th 756, 758.)

Next, the record reflects the presentence custody credit was awarded to Gallardo twice, once on each abstract of judgment. "Credit[, however,] shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (§ 2900.5, subd. (b); see *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1414.) In addition, the award of credits on the indeterminate abstract of judgment is noted as being awarded under section 2933.1 while the credits on the determinate abstract of judgment is marked as awarded under section 4019.

Apart from these clerical errors concerning the presentence credits, the court unlawfully calculated Gallardo's local conduct credit under section 2933.1 rather than under section 4019. Although the court initially indicated that it would award him presentence conduct credit under section 4019, it then decided to calculate the local conduct credit pursuant to section 2933.1. The court subsequently amended the abstract of judgment nunc pro tunc to reflect a larger amount of presentence custody credits under section 2933.1. As the People correctly point out, section 2933.1 limits presentence conduct credit to 15 percent for defendants convicted of violent felonies as defined under section 667.5, subdivision (c) and Gallardo was not convicted of any of those qualifying felonies. (§§ 667.5, subd. (c)(1)-(c)(23), 2933.1, subd. (a); cf., *People v. Thomas* (1999)

21 Cal.4th 1122, 1130 [§ 667.5, subd. (c)(7), only limits three strikes defendant to section 2933.1 credits where underlying conviction itself is punishable by life imprisonment].) Therefore, Gallardo was legally entitled to receive presentence conduct credit under section 4019 and the court's failure to do so also constitutes an unauthorized sentence which must be corrected by the trial court on remand. (See *People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

In sum, the matter must be remanded to the trial court to impose a lawful sentence in accordance with the views expressed above and to prepare new abstracts of judgment reflecting that sentence and the grant of presentence custody credit under section 4019.

DISPOSITION

The felony sentence is vacated and the matter is remanded to the superior court for resentencing in accordance with this opinion. In all other respects, the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.